

In re Interest of Jordan B.

Caselaw No.

300 Neb. 355

Filed on

Friday, June 22, 2018

Summary: In adjudication proceedings under Neb. Rev. Stat. § 43-247(2), the only law violation alleged in the petition against Jordan B. was first degree sexual assault under § 28-319, committed on or between January 25 and November 8, 2016. The state presented evidence that Jordan, 17 years old at the time, and living with a childcare provider (as well as his mother and 19 year old brother), had assaulted one of the children the childcare provider delivered care in the shared home. That evidence specifically consisted of testimony from the 5 year old victim, the victim's mother, the victim's brother (who also attended the day care) and an investigator. That testimony described an event where Jordan had painfully anally penetrated, or attempted to penetrate, the victim at least once and was instructed not to tell anyone.

The victim then told her brother shortly thereafter, who confirmed a similar story to the one later told by the victim to investigators. The victim's brother also described the daycare supervision as being left to Jordan's grandmother, but also occasionally to Jordan's older brother alone or with Jordan, while the childcare provider left to "run errands." The victim's mother confirmed the victim's description of the assault, which the victim had described to her, with the clarification that the assault occurred only once but with uncertainty as to whether penetration had occurred. It was noted that the victim's mother is an HSS investigator of child abuse and neglect, including sexual assaults, but she claimed she never describes her cases or work in any detail to her children.

The investigator that interviewed Jordan testified that Jordan denied the allegations, speculated that they were an act of retaliation for disciplining the victim, and went further to opine that if something did happen, someone else did it.

To that end, Jordan testified on his behalf at the hearing and presented statements from the childcare provider, his grandmother, and his older brother, as well as the video interview of the victim. In the video, the victim recalled the events with some inconsistencies compared to the hearing testimony, specifically that two assaults took place at ages 4 and 5. Jordan's own testimony during the hearing included that he was never alone with the victim, never touched her, never watched the daycare children alone, and only babysat some children alone on weekends but never the victim. Jordan again claimed that someone else must have sexually assaulted the victim.

The provider testified that Jordan was never left alone with the children, as per daycare licensing requirements, because he was not trained in childcare provision. She also described an environment where children are never unsupervised and never alone with Jordan. The grandmother recalled never have seen Jordan at all when she was in the home acting as a care provider. Jordan's older brother gave similar testimony, stating never having seen Jordan and the victim interact.

At the close of arguments, the county attorney asked the court to amend the petition to

attempted sexual assault in the first degree, which Jordan's counsel objected. The court did not offer a ruling on the motion but did record its belief that the court had "authority sua sponte to consider" lesser-included offenses. The county attorney then stated his belief that the State had met its burden on the attempt charge, drawing an objection from the defense as to not having met this burden.

The court took the matter under advisement and eventually entered an order finding Jordan within the meaning of § 43-247(1) but that the State had failed to meet its burden with respect to the original offense alleged of first degree sexual assault. Instead, the court raised sua sponte the lesser included offense of third degree sexual assault under § 28-320(1) and (3). The court explained that is found the victim credible, that the State had proved sexual contact, that Jordan knew or should have known that the victim was incapable of appraising the nature of his conduct, and that the conduct did not cause serious personal injury to the victim.

As result, Jordan appealed the adjudication, arguing that the evidence was insufficient for the juvenile court to adjudicate him on the third degree sexual assault offense.

In its review, the Nebraska Supreme Court first turns its analysis to the due process problem represented by the facts. The federal Constitution's due process allowances, which the Nebraska Constitution has been interpreted to run equal in these matters, require that an information must inform the accused with reasonable certainty of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such a charge as a bar to a later prosecution for the same offense. To charge a defendant, the information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged. See *State v. Van*, 268 Neb. 814 (2010).

Due process concerns do not generally require the State to explicitly set forth in the information the less-included offense of the crime charged. The defendant is by implication charged with the lesser offense when charged with the greater offense and so long as the nature of the crime charged was sufficient to give the defendant notice that he or she could be convicted of the lesser-included offense. See *State v. James*, 265 Neb. 243 (2003). However, it is fundamental that no person may be convicted of a crime for which he or she was not charged and doing so would be "sheer denial of due process." *State v. Newman*, 5 Neb. App. 291 (1997). The Court also makes clear that while juvenile proceedings are not criminal proceedings, juveniles carry the same due process notice requirements and protections. See *In re Gault*, 387 U.S. 1 (1967).

Thus, the Supreme Court turns to the offense of third degree sexual assault, noting that it is a separate and distinct offense from the crime of first degree sexual assault alleged in the petition against Jordan B. As a result, the juvenile court was incorrect in concluding that third degree sexual assault under § 28-320 is a lesser included offense of first degree sexual assault under § 28-319. The Court then noted the statutory elements test adopted in 1993 to determine whether an offense is a lesser-included offense of another. See *State v. Williams*, 243 Neb. 959 (1993). Under that doctrine, to be a lesser-included offense the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time committing the lesser. See *State v. Putz*, 266 Neb. 37 (2003). Applied here, there is a difference in the third degree offense from the first, the Court notes that it is possible to have the sexual penetration described in § 28-319 without the sexual contact described in § 28-320. Additionally, third degree sexual assault requires that the touching be for the purpose

of sexual arousal or gratification, while sexual assault in the first degree does not.

Here, Jordan was adjudicated based on a finding of sexual assault in the third degree, despite the petition alleging only first degree and no evidence submitted to meet the additional elements required of the third degree offense. The Supreme Court concludes that the trial court unfairly denied Jordan the opportunity to raise defenses to the third degree offense in its legal conclusions about the evidence with regard to the first degree offense charged and subsequent adjudication for the third degree offense.

To the State's contention that the Supreme Court could affirm the adjudication for an alternative reason that Jordan committed the implicitly charged less-included offense of attempted first degree assault, the Court responds that the State did not appeal the juvenile court's order in the manner required by § 29-2317. The Supreme Court writes that it cannot allow the State to circumvent the requirements of that law by simply appealing to the Court's de novo review and that legal argument represents a misunderstanding of the nature of the de novo review undertaken by the Supreme Court.

Thus, the Nebraska Supreme Court reverses and remands with directions to vacate the adjudication due to the violation of the Due Process Clauses of the Nebraska and United States Constitutions.
